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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1065

ANNA ERNA LAWRIW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1977. The petition for a writ of certiorari was filed on January 30, 1978 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction should be reversed because she and her co-defendant were represented by the same attorney.

STATEMENT

1. After a bench trial in the United States District Court for the District of Minnesota, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). She was sentenced to five years' imprisonment and a three-year term of special parole (Pet. App. 2).

Petitioner was arrested when federal narcotics agents discovered approximately one pound of cocaine in a motel room she was sharing with her co-defendant, Terrance Richard Noto. The agents also discovered $5,700 in cash in the motel room, including $3,100 in marked bills that federal agents had used the previous evening to buy two ounces of cocaine from several of petitioner's associates (Pet. App. 2–3).

Petitioner and co-defendant Noto were represented at trial by the same retained attorney. Before trial, and in response to questioning by the court and counsel, both defendants acknowledged discussing with their attorney the possibility of a conflict of interest and both expressed their desire to have him continue with the joint representation (Tr. 20–23). The attorney told the court that he had discussed with both defendants the possibility of asserting conflicting defenses, but that both stated that they were not interested in pursuing that course (Tr. 22). The attorney further informed the court (Tr. 22–23) that he had discussed with petitioner

> the possibility of trying this case on the theory that the one who I would not be representing

> was the one who would carry all of the blame. We have discussed every possible ramification of it, from testimony by the party who had already pleaded guilty down to nobody testifying and including everybody testifying. We have explored every possible ramification of it.
>
> In my opinion, and I believe now in theirs, there is no viable possibility of taking one of these people out of this case in any factual manner whatsoever.

The attorney added that as a result of his discussions with his clients, he had determined that there was an "apparent" conflict in the case, but no real conflict (Tr. 23). The court then addressed petitioner and her co-defendant, who both waived objection to any apparent conflict of interest on the part of their attorney (Tr. 23).

The case then went to trial on stipulated facts, supplemented by the court's examination of petitioner. During that examination, petitioner said she did not know exactly how much cocaine was in the motel room, but she admitted that she knew it was being held for sale (Tr. 35). She added that she and Noto had been asked to sell a pound of cocaine to another co-defendant and that the purpose of the trip was to deliver the cocaine. She further admitted that she and Noto had agreed to share in the proceeds of the sale (Tr. 36–37). On the basis of the factual stipulation and petitioner's testimony, the court found petitioner and her co-defendant guilty (Tr. 38, 40).

The convictions were affirmed on appeal in an unpublished opinion. Immediately after the appeal was decided, petitioner moved for a new trial on the ground of newly discovered evidence, claiming that she had been prejudiced by a conflict of interest on the part of her attorney.[1] The dual representation, she maintained, deprived her of the opportunity to assert that she was unaware that there was a pound of cocaine in the motel room (Pet. App. 5).

At a hearing on the motion, the court heard testimony from petitioner and from her former attorney. She testified that she did not fully understand the effect of her waiver of separate counsel (H. 2–4, 22–25)[2] and that she was unaware that there was as much as a pound of cocaine in her room in the motel, although she admitted she knew there was some cocaine in the room (H. 13, 37–38). The attorney testified that petitioner and her co-defendant had been "adamant" about continuing the joint representation and that he had determined that there was no risk of a conflict of interest because everything they had said to him indicated "that they were jointly involved in everything that was going on.* * * [E]verything

[1] Since the claim of conflict of interest and ineffective waiver were not "newly discovered evidence," the motion should not have been brought under Fed. R. Crim. P. 33, but rather under 28 U.S.C. 2255. The difference is more than merely technical, since if the court had determined to grant a new trial under Rule 33, the United States might have been deprived of its right to appeal. See *In re United States*, 565 F. 2d 173 (C.A. 1).

[2] "H." refers to the transcript of the hearing on petitioner's motion for a new trial.

they said to me indicated that this was a joint venture on their part" (H. 61–62). At the conclusion of the hearing, the court found that there was no conflict of interest resulting from the dual representation and that, in any event, petitioner had waived having separate counsel (Pet. App. B).

The court of appeals affirmed in a comprehensive opinion (Pet. App. 1–17). It found that the trial court fully discharged any duty of affirmative inquiry into the possible existence of a conflict and the question of waiver, and it held that petitioner knowingly and intelligently waived the right to separate representation.

ARGUMENT

The problem of conflicts of interest arising from joint representation of criminal defendants is an important one that raises competing Sixth Amendment concerns as well as difficult questions respecting the limitations on judicial supervision of a defendant's choice of counsel. The question of when a court may or must order separate representation and when it must defer to the defendant's choice are sufficiently important that they may well call for this Court's attention in the future.[3] This case, however, does not

[3] The Court presently has under consideration the case of *Holloway* v. *Arkansas*, No. 76–5856, argued November 2, 1977, which also raises the problem of separate counsel, although in a context very different from this case. In *Holloway*, the defendants moved for separate counsel on the ground that they might present conflicting defenses, and the appointed counsel indicated to the court that each of his clients planned to take the stand and that he would be unable, consistent with his obligation to all three, to

present a suitable occasion for review, since in this case there was no conflict of interest; petitioner clearly waived objection to the dual representation; and the court fully complied with any responsibility it may have had to determine in advance of trial that petitioner's waiver was knowing and intelligent.

Petitioner's legal argument, although divided into four parts, reduces in essence to the claim that the district court did not conduct a sufficiently searching inquiry before accepting her waiver of separate counsel. She contends that the process followed in the district court was inadequate (Pet. 13–15) and that the type of inquiry approved by the court of appeals is in conflict with that required in other circuits (Pet. 16–22) and, by implication, by this Court (Pet. 7–13).

1. As we have noted, at the commencement of trial the district court and defense counsel thoroughly questioned petitioner and her co-defendant with regard to their awareness of the possibility of a conflict of interest arising from the dual representation. They were questioned about their discussions with counsel respecting the possibility of conflict and about their desire to continue with a single attorney (Tr. 20–23).[4]

Both defendants readily acknowledged that they had conferred with the attorney about the problem of

cross-examine any one of them on behalf of the others. The issue presented in the instant case is so materially different from that in *Holloway* that there is no occasion to defer disposition of this petition pending the decision in *Holloway*.

[4] This inquiry is of necessity a delicate one, since there is a risk that it will improperly trench upon the defendants' right to withhold disclosure of the substance of their defense until the trial itself.

a possible conflict of interest and in particular about the possibility of conflicting defense strategies. In their presence, and without protest, counsel then explained to the court that he had discussed with each of his clients the strength of their respective cases and the possibility of either defendant seeking to place blame on the other, but that both parties had been unwilling to pursue that course (Tr. 22–23). In view of his discussions with his clients, counsel stated that there was no real conflict of interest problem presented by the dual representation, since there existed no plausible basis for asserting inconsistent defenses, even if the defendants had wanted to do so (Tr. 23). In response to specific questioning from the court, petitioner expressly waived objection to the joint representation (Tr. 23). On this factual record, petitioner's claim that her waiver was ineffective is without merit.

Petitioner's primary contention at the hearing on her motion for a new trial was that she did not comprehend the meaning of the term "conflict of interest" (H. 2–4). This argument continues to be unpersuasive. Both the district court and petitioner's counsel thoroughly interrogated her concerning potentially conflicting defenses and the possible need for a second attorney (Tr. 20–22). Conflict of interest is not a difficult legal concept to grasp, and petitioner's background [5] reflects an above-average intellect. Comment-

[5] Petitioner is a 30-year-old businesswoman who has taught college-level courses in the past (H. 25–27).

ing on petitioner's testimony at the post-trial hearing, the court stated (H. 95–96):

> My observation of this lady is that she is so bright that she knows exactly which questions to avoid and how to obfuscate an answer and it requires only a little analysis of her self-interest to see why she does that. She is trying to play a game with us, and she's plenty bright.

In light of the inquiries by the court and petitioner's responses, and in the absence of anything in the record suggesting that she was unable to make a voluntary and intelligent decision, the court's acceptance of petitioner's waiver was not error. Her desire to continue with the counsel she had originally retained was clearly stated and was not at all unreasonable in view of her election not to pursue a defense inconsistent with that of her co-defendant.[6] Rather than being the product of lack of understanding of the proceedings at trial, her late-blooming contention that the dual representation had unfairly deprived her of the opportunity to present a plausible defense has the earmarks of a ploy devised on the eve of incarceration after all other recourses had failed.

2. The courts of appeals are in agreement that defendants can waive their rights to separate counsel, even if it appears that the dual representation may lead to a conflict of interest. *United States* v. *Garcia,*

[6] The fact that counsel was retained rather than appointed further supports the conclusion that petitioner's decision to continue with the representation was a knowing and intelligent decision. *Larry Buffalo Chief* v. *South Dakota*, 425 F. 2d 271, 279 (C.A. 8); *United States* v. *Gaines*, 529 F. 2d 1038, 1043 (C.A. 7).

517 F. 2d 272 (C.A. 5); *United States* v. *Carrigan,* 543 F. 2d 1053 (C.A. 2); *Lollar* v. *United States,* 376 F. 2d 243 (C.A.D.C.).[7] As petitioner points out, however, the courts differ regarding the duty of the trial court to make inquiry of jointly represented defendants with respect to that waiver. Several circuits, including the court below, require the district court to ascertain the defendants' understanding of their right to separate counsel and their awareness of the dangers inherent in joint representation, to identify any possible conflicts that may exist, and to obtain a knowing and informed waiver in the event the defendants desire to continue the joint representation. See *United States* v. *Warledo,* 557 F. 2d 721, 728 (C.A. 10); *United States* v. *Carrigan, supra,* 543 F. 2d at 1055–1056; *United States* v. *Foster,* 469 F. 2d 1, 4–5 (C.A. 1); *Lollar* v. *United States, supra,* 376 F. 2d at 244–246. At least three others have indicated their approval of such a procedure, *United States* v. *LaRiche,* 549 F. 2d 1088, 1095 (C.A. 6), certiorari denied, 430 U.S. 987; *United States* v. *Truglio,* 493 F.

[7] Petitioner suggests in the last section of her petition (Pet. 22–29) that perhaps defendants should not be permitted to waive separate counsel. No court of appeals has taken this view, although several judges have suggested that it would be wise to adopt such a rule. See *United States* v. *Carrigan*, 543 F. 2d 1053, 1057–1058 (C.A. 2) (Lumbard, J., concurring); *United States* v. *Garafola*, 428 F. Supp. 620 (D. N.J.). While we think there is much to commend this view, it hardly follows that defendants who have been permitted to proceed with joint representation should automatically receive a new trial despite their waiver and their inability to show that an actual conflict of interest existed that impaired their defense at trial.

2d 574, 579 (C.A. 4); *United States ex rel. Hart* v. *Davenport,* 478 F. 2d 203, 209 (C.A. 3); while three circuits have expressly declined to require the practice, at least in the absence of some initial objection, claim or notice to the court of a possible conflict, *United States* v. *Mandell,* 525 F. 2d 671, 677 (C.A. 7), certiorari denied, 423 U.S. 1049; *United States* v. *Huntley,* 535 F. 2d 1400, 1406 (C.A. 5), certiorari denied, 430 U.S. 929; *United States* v. *Christopher,* 488 F. 2d 849, 851 (C.A. 9).

We agree with those courts that encourage or require a pre-trial inquiry by the district court. This procedure serves to alert defendants to the danger of a potential conflict of interest that inheres in joint representation, and it goes a long way towards answering the claims of convicted defendants, on appeal or afterwards, that the joint representation prejudiced them in a manner that they did not appreciate at the time. See *United States* v. *Garcia,* 517 F. 2d 272, 278 (C.A. 5); *United States* v. *Foster,* 469 F. 2d 1, 4–5 (C.A. 1).[8]

In this case, however, the trial court conducted just such an inquiry at the outset of trial. Petitioner's complaint is therefore confined to the nature of the inquiry, rather than whether such an inquiry must be made.

3. Petitioner maintains that the court of appeals erred by not probing her waiver decision in greater

[8] We have discussed this matter in more detail in our brief in opposition in *Hurst* v. *United States,* No. 77-5157, a copy of which we have furnished to petitioner's counsel.

depth. She asserts that there is a conflict among the circuits as to the proper scope of the waiver inquiry, and that the Eighth Circuit adopted too narrow a standard in this case. We disagree.

All the courts of appeals that have treated the matter are in agreement that upon notification of a potential conflict it becomes the affirmative duty of the judge to query counsel and defendants to seek out the facts regarding the matter. See *United States* v. *Foster, supra*; *United States* v. *Garcia, supra*; *United States* v. *Truglio, supra*; *United States* v. *Gaines,* 529 F. 2d 1038, 1044 (C.A. 7); *United States* v. *Alberti,* 470 F. 2d 878, 881–882 (C.A. 2), certiorari denied, 411 U.S. 919. Moreover, where the possibility of conflict is apparent, the courts uniformly agree that there must be a waiver on the record in sufficient detail to demonstrate that a joint defendant was fully advised of the potential problem. See, *e.g., United States* v. *Gaines, supra,* 529 F. 2d at 1043–1044; *United States* v. *Swanson,* 509 F. 2d 1205, 1210 n. 7 (C.A. 8); *Kaplan* v. *United States,* 375 F. 2d 895, 897–898 (C.A. 9).

Accordingly, while formalized guidance for the conduct of such waiver inquiries has not yet emerged in all the circuits, there is universal agreement that, at least when a possible conflict of interest appears, the defendant must be made aware of the possible conflict, the potential perils of the conflict, and the alternatives available respecting the assistance of counsel. That procedure was followed here; and, as the court of appeals found, the procedure clearly afforded pe-

titioner an opportunity to make an intelligent and informed decision. The judicial decisions in this area reflect a continuing refinement of essentially parallel inquiry procedures by the various circuits. Indeed, as this case demonstrates, the Eighth Circuit is at the forefront of the development.[9]

Petitioner seeks to bolster her claim of an inter-circuit conflict by asserting that the procedure adopted by the Eighth Circuit in this case is inconsistent with a "requirement" established by the Fifth Circuit in *United States* v. *Garcia, supra,* 517 F. 2d at 278, that the district court elicit a "narrative" from a joint defendant regarding the proposed waiver of separate counsel (Pet. 16). The court of appeals in this case, however, cited *Garcia* approvingly, as "spell[ing] out in significant detail what must be done to assure an adequate waiver" (Pet. App. 14), and the court's decision does not in any way foreclose or discourage obtain-

[9] In seeking to uncover differences among the circuits on this issue, petitioner has parsed the appellate decisions too finely and has purported to find conflicts in mere differences in phraseology. The Seventh Circuit and the Fourth and Fifth Circuits, for example, which appear at opposite ends of petitioner's "continuum chart" (Pet. 20), are not in conflict on this issue. The Seventh Circuit opinion to which petitioner points, *United States* v. *Mandell, supra,* merely held that the court does not have an affirmative duty to inquire into the question of waiver in the absence of some indication of conflict—which is also the Fifth Circuit's rule. Where a conflict of interest does appear, the Seventh Circuit requires the court to advise the defendant of the dangers of that conflict and to conduct a waiver inquiry along the same lines as that required by every other circuit. See *United States* v. *Gaines,* 529 F. 2d 1038, 1044 (C.A. 7); *United States* v. *Jeffers,* 520 F. 2d 1256, 1263 n. 11 (C.A. 7).

ing a narrative response from a defendant (Pet. App. 15). Moreover, the reference to placing the defendant "at liberty to question the trial court on the nature and consequences of dual representation" (Pet. App. 15), contemplates a colloquy serving the same function as a narrative response. Indeed, the *Garcia* court itself acknowledged that "[m]ere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver." 517 F. 2d at 278. Accordingly, there is no significant conflict among the circuits on this issue and no occasion for further review by this Court.

4. Relying on *Von Moltke* v. *Gilles,* 332 U.S. 708, petitioner argues (Pet. 7–13), that before a waiver of separate counsel can be accepted, a "rudimentary Rule 11 procedure" must be placed on the record. *Von Moltke,* however, applies to the limited situation of a waiver of counsel accompanying a contemporaneous plea of guilty. The detailed requirements for a competent waiver enumerated in that case relate primarily to the multiple waivers associated with entering a guilty plea and are intended to advise a defendant of the consequences of admitting his guilt. They do not apply in the context of a trial. *Hodge* v. *United States,* 414 F. 2d 1040, 1044 (C.A. 9).

Petitioner seeks to avoid this distinction by suggesting that her trial on stipulated facts was tantamount to a guilty plea and therefore required the full regalia of a Rule 11 hearing (Pet. 10–11). This "de facto guilty plea" argument, however, has been expressly rejected by courts that have considered it, since ex-

tension of Rule 11 to include stipulations "would add formality where none is required." *United States* v. *Terrack,* 515 F. 2d 558, 560–561 (C.A. 9); *United States* v. *Brown,* 428 F. 2d 1100, 1102 (C.A.D.C.).

In any event, the district court personally questioned petitioner in detail as to her understanding of the consequences of filing the stipulation (Tr. 4–6, 10–14), and it engaged in extended questioning to determine whether she adhered to the essential admissions in the stipulation (Tr. 25–38). Only after being satisfied from her testimony that he could properly find her guilty on the uncontested facts in the case did the court agree to sign the stipulation and enter a judgment of conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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